RECORD AND BRIEFS

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No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, *et al.*,

Appellants,

v.

WILLIAM WHITFORD, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND LOCAL GOVERNMENT LAW PROFESSORS, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935.[1] Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief through blanket consent.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization whose 11,000 members serve as appointed chief executives and assistants for cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world

Local Government Law Professors include the following seven professors who teach and write in the subject of local government law:

- Nestor M. Davidson is the Albert A. Walsh Professor of Real Estate, Land Use and Property Law at the Fordham University School of Law, where his scholarship and teaching focus on local government law and property. He founded and serves as the academic director of the Urban Law Center.

- Paul A. Diller is a Professor of Law at Willamette University College of Law and the director of its certificate program in law and government. He teaches and writes in the field of local government law, with an emphasis on state-local conflict.

- Clayton Gillette is the Max E. Greenberg Professor of Contract Law at NYU School of Law. He has taught and written in the area of local government law, including work in state pre-emption and the scope of local authority, for several decades.

- Kathleen Morris is a Professor of Law at Golden Gate University School of Law. A former deputy city attorney for San Francisco, her teaching and scholarship focus on local government law, constitutional law, and property.

- Kenneth Stahl is a Professor of Law and the director of the Environmental, Land Use, and Real Estate Law certificate program at Chapman University Fowler School of Law. His scholarly work focuses on the relationship between the local political process and judicial doctrine in land use and local government law.

- Rick Su is a Professor of Law at the University at Buffalo School of Law. He writes and teaches in the areas of local government law, federalism, and immigration.

- Christopher J Tyson is the Newman Trowbridge Distinguished Professor of Law at the LSU Law Center. He writes and teaches in the area of local government law, focusing on issues related to race, class and metropolitan organization.

SUMMARY OF THE ARGUMENT

In addition to the many grave harms flowing from partisan gerrymandering that Plaintiffs and other amici ably highlight to this Court, this brief argues that intentional partisan gerrymandering threatens local democracy, a concept at the heart of our federal system. Local governments — our cities, suburbs, towns, and counties — have served as vital institutions, engaging citizens, crafting policies particularly sensitive to local needs, and fostering innovation and experimentation since the Founding. As this Court has made clear for over a century, state legislatures are responsible for structuring local governments and delegating authority to them. States thus play a vital role in nurturing the local governance that is constitutive of our federal order. To exercise this authority ably, however, state legislatures must themselves be democratically legitimate — that is, reasonably representative of the state's electorate as a whole. Intentional partisan gerrymandering makes state legislatures *un*-representative of the statewide electorate, thus undercutting state legislatures' moral authority to oversee their local governments in a democratically legitimate fashion.

As this brief demonstrates, in a growing number of states, partisan gerrymandering plays a role in undermining the freedom that local governments should have to pursue policies that their residents prefer. Where political gerrymandering shapes state legislatures that skew away from median voters, state oversight can become simply an extension of increasingly polarized partisan politics. Not surprisingly, then, conflicts over state preemption of

local policy are becoming more common, more targeted, and more punitive across the country. A decision in this case upholding the trial court's invalidation of extreme partisan gerrymandering in Wisconsin will help restore public faith in state legislatures as responsible superintendents of the local governments within their boundaries.

ARGUMENT

Introduction

This case concerns whether and to what extent the United States Constitution, either through the Fourteenth Amendment's Equal Protection Clause or the First Amendment, constrains the ability of a partisan majority in a state legislature to use the redistricting process to attempt to lock itself into power in that state for a decade or more. As this Court has noted, "[s]tate legislatures are, historically, the fountainhead of representative government in this country." *Reynolds v. Sims*, 377 U.S. 533, 564 (1964). As such, it is essential that "a majority of the people of a State [be able to] elect a majority of that State's legislators." *Id.* at 565. At least at the state level, therefore, majoritarian government is woven into our constitutional order through the doctrine of one-person, one-vote articulated in *Sims*. Much of this Court's post-*Lochner v. New York*, 198 U.S. 45 (1905), jurisprudence depends upon the political process to correct misjudgments made by the legislature, with the theory being that unpopular laws can be overturned by the "people" acting through a legislature that represents their views in some fair or accurate way. *E.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) ("[I]t is for the legislature, not the

courts, to balance the advantages and disadvantages of [regulation.]").

As Appellees and other amici argue, a democratically legitimate, majoritarian state legislature is crucial for many reasons, including that the legislature is the primary instrument for producing the state's public policy. This brief highlights an additional, particularly important reason why state legislatures' composition must be democratically legitimate: they profoundly affect the ability of *local* governments throughout the state to make their own policy choices. This Court has made clear that for federal constitutional purposes, cities are "convenient agencies for exercising such of the governmental powers" that a state may entrust to them. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). Hence, states may "modify or withdraw all such powers" granted to cities and may even go so far as to "destroy the [municipal] corporation." *Id.* at 178-79; *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (observing that *Hunter* "emphasiz[es] the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them."). Given the near-plenary power that state legislatures may exercise over their political subdivisions, it is critical that they possess the utmost democratic, majoritarian legitimacy when wielding it.

Most states, including Wisconsin, have in their state constitutions or enacted by statute a system of "home rule" whereby cities and/or counties are granted a broad range of default powers to regulate conduct, raise revenue, manage their property and employees, and

structure their own governments. *E.g.*, WIS. CONST. art. XI, § 3 ("Cities and villages organized pursuant to state law may determine their local affairs and government . . . ."); *see also* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1374 app. (2009) (listing all state constitutional home rule provisions as of 2009). While these provisions "leave much policy and decisionmaking" to local governments, *Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968), they also often reserve in state legislatures broad latitude to preempt local authority. *E.g.*, WIS. CONST. art. XI, § 3 (conditioning city power on consistency with the state constitution and "such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village"); *see also* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1126-27 (2007) ("[M]ost states now have at least some version of legislative home rule, in which the state legislature has significant authority to preempt local ordinances.").

In some states, there are procedural limits on the manner in which a state legislature may preempt, such as a requirement to preempt uniformly, but so long as that requirement is met the state may preempt any or almost any local measure. *E.g.*, *Black v. City of Milwaukee*, 882 N.W.2d 333, 343 (Wis. 2016) (holding that the state legislature may preempt a city charter ordinance "*either* (1) when the enactment addresses a matter of statewide concern, *or* (2) when the enactment with uniformity affects every city and village"). Hence, local authority is in many states robust as a default

matter, but often at the mercy of preemption by state legislatures.[2]

If the state legislature that preempts local authority truly represents the majority of the state's voters in the spirit of *Sims*, then preemption of local law is relatively unproblematic. A majority of the state may appropriately decide that a policy enacted by a minority — in a particular city or county — is inconsistent with the state's policy preferences.[3] Preemption thus is one means for the state to preserve its *Hunter*-recognized authority as sovereign over its

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[2] A minority of states protect constitutionally some residuum of local power, often limited to structural matters like the design of the local government or matters dealing with local employees. *See* Baker & Rodriguez, *supra*, at 1339 n.12 (counting 23 "imperio" home rule states as of 2009); Paul A. Diller, *Reorienting Home Rule: Part 2 – Remedying the Urban Disadvantage through Federalism and Localism*, 77 LA. L. REV. 1045, 1066 (2017) (counting "approximately 15" states in which some subjects of local enactment are constitutionally protected from state override). Even in many of these states, however, the protection of local authority in specific areas is not absolute but rather may be breached when the state legislates in that area to address a matter of "statewide concern." *E.g.*, *Jacobberger v. Terry*, 320 N.W.2d 903, 905-06 (Neb. 1982) (upholding state law requiring cities to elect their council members on a district rather than at-large basis due to "statewide concern" for "socioeconomic" diversity on councils).

[3] The state's exercise of power over its localities, of course, just like the action of local governments themselves, is subject to appropriate constitutional constraints. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a statewide referendum amending the Colorado constitution to override three city initiatives recognizing sexual orientation as a protected class violated the Equal Protection Clause of the Fourteenth Amendment).

local entities. If the preempting state legislature, however, does not represent the state's voters in the spirit of *Sims*, however, but rather due to gerrymandering represents an entrenched political minority, then preemption may be extremely troubling from a democratic standpoint.

I. The Importance of Local Government to Our Constitutional Order

While a state's ultimate control over its local entities is well-established, this Court has nonetheless long recognized the critical importance in our constitutional order of political power being exercised at the local level — that is, the level closest to those governed. *E.g.*, *Avery*, 390 U.S. at 481. As this Court recently stated in the federalism context, preserving a space for more local governance "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive'" by fostering competition for a mobile citizenry. *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

Each of these enduring and vital arguments aptly applies to our nation's great cities, small towns, rural counties, and the rest of the panoply of local governments in our federal system. To begin, local governments have a distinct ability to reflect the particular needs and interests of diverse communities across the country. As Justice Brandeis so famously argued, decentralization can foster innovation in

policymaking. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

If the fifty states' ability to serve as "laboratories of democracy" is well-recognized, by sheer quantity the thousands of cities and counties throughout the nation are even better positioned to innovate with respect to policy in all sorts of substantive areas. Whether tackling public health challenges, advancing economic development, developing novel strategies for environmental protection, grappling with the challenges of public safety, or addressing so many other policy challenges, our cities, towns, and counties have been true laboratories of democracy, with innovations at the local level often adopted by states and the national government when they succeed (and cabined when they fail). *See generally* Paul A. Diller, *Why Do Cities Innovate in Public Heath? The Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219 (2014) (discussing dynamics of local innovation and policy diffusion) [hereinafter, Diller, *Why Innovate?*]. Ensuring that all three levels of governance are empowered in our federal system is vitally important. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 538 (1995) ("A key advantage of having multiple levels of government is the availability of alternative actors to solve important problems. If the federal government fails to act, state and local government action is still possible. If states fail to deal with an issue, federal or local action is possible.").

In addition to their ability to serve as crucial laboratories of government innovation, municipalities also offer uniquely democratic benefits of participation. From the original New England town meetings of the founding generation — a tradition that still endures — to communities across the country today, opportunities for participation and interaction with local officials abound at the local level in ways that are simply not possible for ordinary citizens at the state and federal levels. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 181 (H. Reeve trans. 1961) ("It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies."). In part, this is because there are generally far fewer constituents for each elected official even in our largest global cities, compared to that of state and national politics. Diller, *Why Innovate?*, *supra*, at 1257-58. These representation ratios allow local leaders to respond more directly to the people who elect them.

Local governments enhance democracy in another related sense, one that de Tocqueville also highlighted when he noted that "[t]own-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." DE TOCQUEVILLE, *supra*, at 76. Service on one of our nation's countless city councils, school boards, county commissions, and myriad other local bodies provides an invaluable training ground for public leaders. Eventual leaders in our state and national governments often learn their earliest lessons in the crucible of local government. When states aggressively preempt local power, it may sap the will of

residents to run for local office. Why spend hours per week serving in an unpaid city council position, for instance, when the city's authority to regulate in key areas has been eviscerated by the state?

As laboratories of policy and incubators of democratic values, local governments have played a vital role in advancing civil rights. Some of the earliest antidiscrimination provisions emerged at the local level, years before the federal government passed the Civil Rights or Fair Housing Acts. *See* Pamela H. Rice & Milton Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679 (reviewing local antidiscrimination ordinances that applied to employment, housing, and public accommodations). Cities at the vanguard of civil rights promotion sometimes face resistance from their states. In previous decades, this resistance emanated from the initiative process. *E.g.*, *Romer*, 517 U.S. at 623; *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). More recently, however, as gerrymandering has appeared to warp their makeup, state legislatures have targeted local antidiscrimination laws for preemption, such as in North Carolina.[4]

Finally, it has long been recognized that a certain amount of healthy competition among cities promotes efficiency and accountability in governance. *Cf.* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 96-97 (2005) (reviewing empirical evidence that "migration patterns between city and suburbs are significantly affected by

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[4] *See infra* Section III.C.

tax levels and investment in education"). Decentralization has some logic at the scale of the fifty states, but our nation's cities, towns, and counties have much greater ability to craft policies to respond to the preferences of mobile residents.

In short, the logic of the many benefits that this Court has rightly associated with decentralization and devolution strongly support the empowerment of local governments in our federal system. At the very least, these values require that if and when a state takes a policy choice off the table for local democracy, its legislature possess the democratic legitimacy to justify such a trump.

II. Intentional Political Gerrymandering Can Foment Excessive Preemption and Other Harms to Local Decisionmaking

Intentional political gerrymandering may skew the representation of the state legislature far away from the majority or the median voter. In a politically moderate state, therefore, intentional political gerrymandering may result in a legislature that is far from moderate, skewing heavily toward a particular political party, ideological belief system, or set of issues.

Political groups and citizens whose agenda is disfavored at the state level in part due to intentional gerrymandering might look to another level of government — local government at the city, county, or special district level — to pursue policy goals that are not politically feasible at the state level. Although no state is required by the federal Constitution to have cities, towns, or counties, states have "universally"

chosen to create and empower them because of the benefits of local democracy. *Avery*, 390 U.S. at 481.

In a well-functioning state democracy, local governments would enjoy the freedom to pursue the policies their residents prefer. Of course, when the externalities of local policies are too great or when the state's interest in the uniformity of a regulatory regime is paramount, the state legislature might choose to preempt the local policy. When the choice to preempt, however, does not reflect the will of voters statewide but, rather, the warped view of a politically gerrymandered state legislature, such preemption is much more problematic democratically.

For instance, a highly gerrymandered state legislature in a politically moderate state might adamantly oppose a minimum wage increase. Statewide voters may be cool to the idea of a statewide minimum wage increase, but not so adamantly against it that they would want to prohibit local communities from enacting higher minimum wages in their jurisdictions if they see fit. Nonetheless, in addition to refusing to enact a higher minimum wage, a gerrymandered state legislature in such a circumstance might prohibit any local government from enacting a higher minimum wage. Alternatively, a highly gerrymandered state legislature might insist on heightened wages and benefits for municipal employees. Statewide voters may be mildly supportive of the idea, but not so much so that they would prefer to force such a regime on every city and county statewide. Nonetheless, a highly gerrymandered legislature might do so.

The propensity for intentional gerrymandering to lead to state legislative preemption is exacerbated in recent years by two trends: 1) the increased ideological polarization of the two major political parties, *see* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1086-87 (2014) (citing numerous sources for the proposition that today's state and national political parties are more partisan and ideologically cohesive than they were decades earlier), and 2) an ideological and partisan divide between urban and exurban/rural areas. *See* Paul A. Diller, *Reorienting Home Rule: Part 1 – The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 292-97 (2016) (reviewing literature establishing a spatially divided electorate) [hereinafter, Diller, *Urban Disadvantage*]. With respect to the first trend, many years ago, for instance, Southern states may well have been gerrymandered in favor of the Democratic party, but that Democratic party was often far more ideologically diverse than its current version. Hence, an intentional gerrymander in favor of Democrats in the 1980's, for instance, might have preserved the party's power but did not necessarily advance a particular ideological agenda.

With respect to the second trend, large, densely populated urban areas (including big cities and many inner-ring suburbs) have developed a strong preference for Democratic candidates in most partisan elections while, on the other hand, rural, exurban, and some suburban voters have developed a strong preference for Republican candidates. *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. POL. SCI. 239, 241 (2013). Some Republican map-

drawers, such as in Wisconsin, have seized on this demography to unfairly "pack" Democratic voters into small urban districts that Democratic candidates win overwhelmingly while "cracking" the Democratic voters on the urban and suburban fringe into larger, gerrymandered geographical districts that Republican candidates can win comfortably, but not as overwhelmingly. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 551 n.45 (2004) (reviewing the concepts of "packing" and "cracking"). Under such schemes, Democrats may proportionally "waste" more votes in big cities, resulting in a ruling Republican party that does not represent those large cities in a meaningful way. *See* Diller, *Urban Disadvantage*, *supra*, at 338-40. As a result, it has become common for Republican-dominated legislatures in states with partisan and ideological divides along geographic lines to crack down on the political preferences of large cities. Section III, below, illustrates vividly how this dynamic has played out in five states: Florida, Michigan, North Carolina, Ohio, and Wisconsin.

Intentional partisan gerrymandering, of course, is not limited to Republican-dominated legislatures. States with intentional pro-Democratic gerrymandering might be expected to under-represent the preferences of voters from small towns and rural areas when those voters generally prefer Republican candidates and policies. Such voters may find their ability to express their preferences muted when the state legislature preempts certain areas from local control.

Preemption is not the only democratic harm vis-à-vis local governments that might be expected to result from intentional political gerrymandering. Other potential harms to local democracy include: reducing funding to cities and counties generally; punishing cities and counties — and even local officials — for ordinances that go beyond state law, *e.g.*, 2017 Tex. Sess. Law Serv. 4 (West) (codified at TEX. GOV'T CODE ANN. §§ 752.053 & 752.0565 (West 2017)) (imposing civil penalties on local entities that "endorse a policy . . . [that] materially limits the enforcement of immigration laws," and allowing the attorney general to seek the removal of officials who similarly endorse such policies);[5] refusing to grant home-rule authority in those states that lack a constitutional or statutory home-rule provision; and refusing to reconsider preemption from pre-gerrymandered days despite different circumstances.

As a counter-argument to the well-supported charge that intentional partisan gerrymandering distorts the legislative output, the dissenting judge in the court below pointed out that the Wisconsin governor, unlike state legislators, is elected statewide.[6] *Whitford v. Gill*,

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[5] A federal district court recently enjoined enforcement of this aggressive preemption statute that sought to curtail "sanctuary city" policies of local governments in Texas. *City of El Cenizo v. Texas*, No. SA-17-CV-404-OLG (W.D. Tex. Aug. 30, 2017). Although basing its decision in large part on the statute's apparent unconstitutional vagueness, the court also took note of "[t]he fact that SB 4's passage was motivated in part by a political feud between local and state elected leaders." *Id.* at 59.

[6] Among the fifty states, only Vermont and Mississippi have gubernatorial election systems that stray from a straight-up one-

218 F. Supp. 3d 837, 936 (W.D. Wis. 2016) (Griesbach, J., dissenting). Through his or her veto power over legislation, therefore, a governor might be expected to mitigate or neutralize the effects of political gerrymandering on the legislature's output. *Id.* With respect to preemption, there is some evidence of governors stepping in to protect local authority from legislative attempts to target it, particularly in states where the governor is of a different party than the legislative majority. *E.g.*, Colin Reischman, *Nixon Vetoes Bill Limiting Minimum Wage for Cities*, MO. TIMES (July 10, 2015), http://themissouritimes.com/19526/nixon-vetoes-bill-limiting-minimum-wage-for-cities/. Particularly when the governor is of the same party as the majority in both houses of the legislature, however, he or she is unlikely to veto every piece of preemptive legislation — even when such legislation is unpopular — for a variety of reasons. Governors must work collaboratively with legislatures in order to accomplish their agendas, thus requiring them to save their vetoes for when they are especially important to them. Moreover, rather than necessarily represent the proverbial median voter, a successful gubernatorial candidate instead represents a "support coalition" that is successful in a particular election. *Cf.* Keith T. Poole & Howard Rosenthal, *The Polarization of American Politics*, 46 J. POL. 1061, 1065–66 (1984) (noting that U.S. senators from the same state but from different parties have highly dissimilar voting records, suggesting that each party represents an extreme support coalition in the state). Finally, even if the

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person, one-vote system. *See* Diller, *Urban Disadvantage*, *supra*, at 336 n.182.

governor can serve as a check on the gerrymandered state legislature, this is only a negative power and can never allow for the majority of voters in a state to "pass an agenda consistent with their policy objectives." *Whitford*, 218 F. Supp. 3d at 901 n.266.

III. The Record of Preemption in States with Significant Recent Indicia of Intentional Partisan Gerrymandering

The states highlighted here are those with high efficiency gaps (at least more than 10% in absolute value) in their state houses since 2012 or 2014, as calculated by the Plaintiffs' expert, Simon Jackman. *See* Joint Appendix, Vol. II ("SA") 183-84 (explaining Jackman's "efficiency gap," or "EG," calculations). As articulated by the court below, the EG is an objective measurement of the extent to which each of the two major political parties "waste" votes in legislative elections. *Whitford*, 218 F. Supp. 3d at 903-04. The EG thus "measures the magnitude of a [districting] plan's deviation from the [normal] relationship . . . between [statewide] votes and [total] seats." *Id.* at 907. Plaintiffs proposed 7% as a legally significant threshold for an EG, in part because based on their expert's testimony, an EG of 7% or more indicates that the districting plan will have tremendous staying power during the decennial period. *Id.* at 860-61. As made clear by the trial court, a high EG alone does not prove intentional partisan gerrymandering; nonetheless, it may serve as "corroborative evidence" of an aggressive and effective partisan gerrymander. *Id.* at 910. For these reasons, this section focuses on states that had at least a 10% EG in the lower house of the state legislature in one of the first two years of their post-

2010 districting plans, as well as other indicia of partisan gerrymandering, such as a legislative-approved districting map enacted on a largely partisan basis or court decisions finding some partisan gerrymandering in the state districting process. In addition to Wisconsin, these states are (in alphabetical order): Florida, Michigan, North Carolina, and Ohio. Each demonstrates a recent record of aggressively attacking local authority.

A. Florida

Florida is a politically competitive state. Presidential elections there are notoriously won by razor-thin margins. *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000). Since 2000, a Democratic presidential candidate has won the state twice, while a Republican candidate has won three times. *See David Leip's Atlas of U.S. Presidential Elections*, http://uselectionatlas.org/ (click to presidential election results in 2000, 2004, 2008, 2012, and 2016, and hover over Florida for each) (last visited August 31, 2017) [hereinafter, "Leip"]. The average margin of victory in the five races is 1.47%. *Id.* In other statewide races, Florida shows evidence of being a state evenly split between Democrats and Republicans. The last two gubernatorial elections have been extremely close, with the Republican incumbent Rick Scott winning by 1.07% in 2014 and 1.15% in 2010. RHODES COOK, AMERICA VOTES 31: ELECTION RETURNS BY STATE 2013-2014 81 (2015). The state's senate seats are split between a Democrat and Republican. *See* States in the Senate, Florida, http://www.senate.gov/states/FL/intro.htm (last visited Sept. 5, 2017).

Despite this apparent parity in statewide elections, the Republican party has had a majority in the Florida state legislature since the late 1990's. *See Florida State Legislature*, Ballotpedia, https://ballotpedia.org/Florida_State_Legislature (last visited Sept. 4, 2017). In recent years, the majority has been utterly dominant, with Republicans enjoying, for instance, an 82-37 seat advantage in the state house and a 26-14 margin in the state senate after the November 2014 elections. *Florida House of Representatives elections, 2014*, Ballotpedia, https://ballotpedia.org/Florida_House_of_Representatives_elections,_2014 (last visited Sept. 4, 2017); *Florida State Senate elections, 2014*, Ballotpedia, https://ballotpedia.org/Florida_State_Senate_elections,_2014 (last visited Sept. 4, 2017). There is evidence that Republicans used their control of all three branches of government after both the 2000 and 2010 redistricting to ensure that the state legislature (as well as the state's U.S. House delegation) would become and remain disproportionately Republican. Reviewing the post-2000 state legislative and Congressional districting plans, a federal court observed that "[t]he Republican-controlled legislature intended to maximize the number of Republican . . . legislative seats through the redistricting process, and used its majority power to" effectuate this intent. *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1296 (S.D. Fla. 2002). The amicus brief of FairDistricts Now, Inc., filed in this case, details the litigation regarding Florida's post-2010 gerrymandering, including court decisions ordering remedial steps to be taken before the 2016 elections. Brief for Cal. Citizens Redistricting Comm'n et al. as Amici Curiae Supporting Appellees at 10-13, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017). In

addition to this litigation history, the Jackman Report shows Florida's state house having some of the highest pro-Republican EG's in the country in the 2012 and 2014 elections, with each greater than 10%. SA253.[7]

Hence, there is good reason to believe that despite Florida's politically split electorate, intentional political gerrymandering played a big role in locking in a Republican majority in the state legislature, at least until 2016. This majority, which disproportionately represents exurban and rural areas in the state, *cf.* Rodden & Chen, *supra*, at 244 (noting that "Democrats in Florida [are] highly concentrated in downtown Miami" and several other large cities, while suburbs and rural areas "are generally Republican"), aggressively contravened the policy preferences of many — perhaps even a majority — of the state's voters. For instance, despite President Barack Obama winning the state in 2012 in a campaign largely focused on the merits of his signature domestic achievement, the Affordable Care Act ("ACA"), *see* COOK, *supra*, at 80, the Florida legislature rejected attempts to expand Medicaid under the ACA. *See*

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[7] The efforts to remedy gerrymandering before the 2016 elections in Florida applied only to U.S. House and state senate districts. *See* Brief for Cal. Citizens Redistricting Comm'n et al., *supra*, at 12-13. Indeed, an exhaustive study of efficiency gaps in the 2016 elections by the Associated Press ranks the Florida state house's EG as the fourth highest in absolute value, and the third highest among those that favor Republicans, resulting in an excess of almost 11 house seats for Republicans. Associated Press, *Redrawing America: an Efficiency Gap Analysis* (2017), http://data.ap.org/projects/2017/efficiency-gap/ (click on "Statehouses_Elections" link for data spreadsheet) (last visited Sept. 5, 2017) [hereinafter, "AP Report"].

Russell Berman, *Florida Struggles to Pay the Tab for Rejecting Obamacare*, THE ATLANTIC (May 8, 2015), https://www.theatlantic.com/politics/archive/2015/05/florida-struggles-to-pay-the-tab-for-rejecting-obamacare/392678/ (discussing the Florida house's resistance to Medicaid expansion despite state senate and sometime gubernatorial support for the proposal).

With respect to local government in particular, the state legislature has in recent years targeted important subject matters for sweeping preemption. In 2013, the state legislature preempted any city or county in the state from regulating private employers' workplace benefits and strengthened the state's ban, initially enacted in 2003, on local minimum wage ordinances. 2013 Fla. Sess. Law Serv. ch. 2013-200 (West) (codified as amended at FLA. STAT. § 218.077 (2017)). This preemption law has been held to prevent Miami Beach from raising its local minimum wage despite the preferences of the city's residents and elected officials. *Fla. Retail Fed'n, Inc., et. al., v. City of Miami Beach*, No. 16-031886-CA-10 (Fla. Cir. Ct. Mar. 27, 2017), *appeal docketed*, No. 3D17-705 (Fla. Dist. Ct. App. Mar. 30, 2017). Similarly, in 2016 the legislature preempted localities from regulating polystyrene containers and plastic bags. 2016 Fla. Sess. Law Serv. ch. 2016-61 (West) (codified at FLA. STAT. § 500.90 (2017)). Some cities have been able to enforce their bans thus far because either the legislature grandfathered them in or because the Florida courts deemed them protected by the state constitution. *Id.* (exempting "local ordinances or provisions thereof enacted before January 1, 2016"); *Fla. Retail Fed'n, Inc. v. City of Coral Gables*, No. 2016-018370-CA-01 (Fla. Cir. Ct. Mar. 9, 2017) (invalidating state preemption as to cities within Miami-Dade

County, which enjoy constitutional home-rule immunity to special legislation), *appeal docketed*, No. 3D17-562 (Fla. Dist. Ct. App. Mar. 15, 2017). For most cities in the state, however, the ban will stymie policy experimentation with respect to protecting the environment. Finally, a 2011 law imposes penalties on any locality or local official that attempts to regulate firearms beyond state law. 2011 Fla. Sess. Law Serv. ch. 2011-109 (codified at FLA. STAT. § 790.33 (2017)). Litigants have attempted to use this law to punish local officials for not affirmatively removing firearms ordinances enacted decades ago from the current city code, even if they went unenforced. *Fla. Carry, Inc. v. City of Tallahassee,* 212 So. 3d 452 (Fla. Dist. Ct. App. 2017).

In sum, the residents of a "purple" state like Florida that might prefer to turn to their local government to enact certain policy preferences have found themselves blocked from doing so due to a political majority in the state legislature that may well have been attributable to intentional political gerrymandering.

B. Michigan

As demonstrated by the November 2016 election, Michigan is a perennial "swing state." The Republican candidate for president, Donald Trump, won the state by a mere 0.22 %. Leip, *supra* (click to 2016 presidential election results and hover over Michigan). The state was reliably Democratic in the six prior presidential elections, although often targeted by Republicans for contention. Lauren Gibbons, *How Michigan's Presidential Election Map Has Changed Since the 1980s*, MLive.com, Oct. 27, 2016, http://www.mlive.com/news/index.ssf/2016/10/five_ta

keaways_from_three_deca.html. The state has had two Democratic senators since 2006, while Democrats and Republicans have traded occupancy of the governor's office in the last two decades. *See* States in the Senate, Michigan, http://www.senate.gov/states/MI/intro.htm (last visited Sept. 5, 2017); COOK, *supra*, at 188.

Despite this seeming partisan parity at the statewide level, Republicans utterly dominate the Michigan state legislature, holding a 63-45 advantage in the house and a 27-11 majority in the senate. *Michigan State Legislature*, Ballotpedia, https://ballotpedia.org/Michigan_State_Legislature (last visited Sept. 4, 2017). In 2012, for instance, Democratic state house candidates won by 53 to 46% statewide, yet remarkably Republicans held on to a 59-51 majority. *Michigan House of Representatives elections, 2012*, Ballotpedia, https://ballotpedia.org/Michigan_House_of_Representatives_elections,_2012 (last visited Sept. 4, 2017). Similarly, in 2014, Democratic state house candidates won statewide by a margin of 51 to 49%, yet lost four seats for a 63-47 Republican advantage. *Michigan House of Representatives elections, 2014*, Ballotpedia, https://ballotpedia.org/Michigan_House_of_Representatives_elections,_2014 (last visited Sept. 4, 2017).

Indeed, the Jackman Report estimates the EG for the Michigan state house to be greater than 10% in each of 2012 and 2014, among the highest in the nation. SA253. In 2016, Democrats and Republicans essentially tied statewide in the house, yet Republicans maintained their 16-seat edge. *AP Analysis Shows How Gerrymandering Benefited GOP in 2016*, MLIVE.COM, June 27, 2017, http://www.mlive.com/

news/index.ssf/2017/06/ap_analysis_shows_how_gerryman.html ("Last fall, voters statewide split their ballots essentially 50-50 . . . [y]et Republicans won 57 percent of the [state] House seats, claiming 63 seats to the Democrats' 47."). According to the Associated Press ("AP"), the EG in the Michigan state house in 2016 was the second highest in the nation, resulting in more than 11 excess seats for House Republicans. AP Report, *supra*. As demonstrated by the Jackman Report, high pro-Republican EG's date back to the 2000's. SA214. This is not surprising, given that after both the 2000 and 2010 censuses, the Republican-controlled Michigan legislature adopted partisan districting plans with the approval of Republican governors. *Michigan, All About Redistricting*, http://redistricting.lls.edu/states-MI.php (last visited Sep 4, 2017).

The skewing of the Michigan legislature away from statewide voter preferences has resulted in legislation that deprives local governments of significant authority. Most notably, in 2012, with Detroit's fiscal crisis in the background, the state legislature enacted an emergency manager law that stripped elected city councils and mayors of their powers despite a statewide initiative passed a month earlier that sought to rescind that law. 2012 Mich. Legis. Serv. P.A. 436 (S.B. 865) (West) (codified at MICH. COMP. LAWS ANN. § 141.1549 (West 2013)); 2011 Mich. Legis. Serv. P.A. 4 (H.B. 4214) (West) (codified at MICH. COMP. LAWS ANN. § 141.1501 West 2012)) (rejected via referendum as Proposal 1 in 2012); *see also In re City of Detroit*, 504 B.R. 97, 121-22 (Bankr. E.D. Mich. 2013) (reviewing history of the emergency manager law used to steer Detroit into bankruptcy). In other words, despite the

Michigan voters' clear statewide preference for protecting local democracy, the legislature reached a very different conclusion. In addition to engendering bitterness among some Detroit residents at their city being steered into bankruptcy by a state-appointed functionary, the re-instituted emergency manager law may also have played a role in causing the Flint lead-poisoning water crisis. Paul Egan, *Is Emergency Manager Law to Blame for Flint Water Crisis?*, DETROIT FREE PRESS (Oct. 24, 2015), http://www.freep.com/story/news/politics/2015/10/24/emergency-manager-law-blame-flint-water-crisis/74048854/.

In the last two years the Michigan legislature has also enacted aggressive legislation depriving local governments of authority to regulate. In 2015, the legislature enacted the so-called "Death Star bill" preventing cities and counties from regulating any aspect of the employment relationship, including minimum wage, leave, and benefits. 2015 Mich. Legis. Serv. P.A. 105 (West) (codified at MICH. COMP. LAWS ANN. §§ 123.1381-123.1396 (West 2017)); *see also* Emily Lawler, *Gov. Rick Snyder Signs 'Death Star' Bill Prohibiting Local Wage, Benefits Ordinances*, MLive.com, June 30, 2015, http://www.mlive.com/lansing-news/index.ssf/2015/06/gov_rick_snyder_signs_death_st.html. In 2016, the state legislature enacted a ban on local plastic bag regulation, *see* 2016 Mich. Legis. Serv. P.A. 389 (S.B. 853) (West) (codified at MICH. COMP. LAWS ANN. § 445.591 (West 2017)), after the county commissioners of Washtenaw County, which includes the city of Ann Arbor, voted in favor of an ordinance that would impose a 10-cent fee on paper and plastic bags. *See* Chelsea Harvey, *Yes, This Is*

Real: Michigan Just Banned Banning Plastic Bags (Dec. 30, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/30/yes-this-is-real-michigan-just-banned-banning-plastic-bags/?utm_term=.63e5a19f886f; *see also* Memorandum from Evan N. Pratt, Water Resources Comm'r, Washtenaw Cnty., on Carryout Bag Ordinance to Andy LeBarre, Chair, Ways & Means Comm., Washtenaw Cnty. (May 4, 2016), http://www.ewashtenaw.org/government/boc/agenda/wm/year_2016/2016-05-04wm/ALLA1a1BOCMemoResolution_BagOrdinanceAdoption.pdf (including copy of proposed ordinance). The new state law prevented the proposed local ordinance from ever going into effect. *See id.* at 2.

C. North Carolina

Perhaps in no state have the effects of gerrymandering been as devastating to local governments — and the economy of the entire state — than in North Carolina. North Carolina has traditionally been seen as a politically moderate state. While it often voted Republican in presidential elections, it has had a tradition of "moderate-to-progressive state government" and electing senators and governors from both major political parties. Chris Kardish, *How North Carolina Turned So Red So Fast*, GOVERNING (July 2014), http://www.governing.com/topics/politics/gov-north-carolina-southern-progressivism.html. Moreover, in 2008, North Carolina became a true "swing state" in presidential elections by voting for the Democratic candidate, Barack Obama, for the first time since 1976. COOK, *supra*, at 267. In the two subsequent elections, 2012 and 2016, the state voted for the Republican presidential candidate by an

average narrow margin of 2.85%. Leip, *supra* (click to 2012 and 2016 presidential election results and hover over North Carolina).

After a Republican sweep of both houses of the legislature and the governor's office in 2010, however, the state legislative maps were drawn in an entirely partisan fashion. Indeed, the vote in favor of the 2011 redistricting plan in the state house was 66 to 53, with all but two Republicans voting yes and all Democrats present (one was absent) voting no. *See* North Carolina House of Representatives, Roll Call Vote on HB 937 (July 27, 2011), http://www.ncga.state.nc.us/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2011&sChamber=H&RCS=1287. As a result of this apparent intentional gerrymander, the North Carolina legislature has taken on a profile that skews sharply away from the state's traditional approach to governance. As Jackman demonstrates, the North Carolina state house's EG in 2012 and 2014 were among the highest in the nation in absolute value, with each greater than 10%. SA253. The AP's analysis of the 2016 state house elections found a slightly lower, but still significant, EG of 5.51%, resulting in an estimated additional 6.6 Republican seats. AP report, *supra*.

Because its gerrymander-enabled majority skews away from the preferences of the state's urban voters, the North Carolina legislature has been aggressive since 2012 in preempting the priorities of urban centers within the state. North Carolina's cities derive their powers from statute rather than from the state constitution; hence, they are particularly susceptible to being overridden by the state legislature. *See* Frayda

S. Bluestein, *Do North Carolina Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1985 (2006) ("North Carolina local government powers are established through specific statutory delegations . . . ."); *see also* Baker & Rodriguez, *supra*, at 1338 & n.10 (describing North Carolina as having "no [constitutional] home rule at all").

In one of the most prominent instances of preemption nationally in recent years, the legislature in 2016 preempted Charlotte's antidiscrimination ordinance that sought to extend the antidiscrimination protections of local law to gay, lesbian, and transgender persons. CHARLOTTE, N.C., MUN. CODE. §§ 12-56 to 12-58 (2017) (noting that it was preempted by state law and invalidated as of Mar. 23, 2016 by 2016 N.C. Sess. Laws 3). The state law, popularly known as House Bill 2, "HB2," or "the bathroom bill," because its supporters argued that it would keep men out of women's bathrooms, Editorial, *North Carolina's Bigoted Bathroom Law*, N.Y. TIMES, Mar. 25, 2016, at A24, spurred a national backlash leading numerous companies, sports organizations, and high-profile entertainers to boycott the state. *See* Ryan Bort, *A Comprehensive Timeline of Public Figures Boycotting North Carolina Over the HB2 'Bathroom Bill'*, NEWSWEEK, Sept. 14, 2016, http://www.newsweek.com/north-carolina-hb2-bathroom-bill-timeline-498052. In addition to preempting local antidiscrimination laws, HB2 preempted the ability of local governments to enact higher minimum wage ordinances, regulate leave or benefits, or require that city contractors hire local employees. 2016 N.C. Sess. Laws 3, *supra*, §2.1 (codified at N.C. GEN. STAT. § 95-25.1 (2017)). The national outcry over HB2 ultimately forced the

legislature to pass a partial repeal, 2017 N.C. Legis. Serv. 4 § 1 (West). The repeal, however, prohibits any political subdivision from regulating private employment practices or public accommodations until 2020. *Id.*

D. Ohio

Ohio is a politically competitive state, commonly understood as the nation's most reliable bellwether in presidential elections. *See* KYLE KONDIK, THE BELLWETHER – WHY OHIO PICKS THE PRESIDENT (Ohio Univ. Press 2016). While 2016 had a relative wide margin for the winning candidate—51.69% to 43.56%—the average margin of victory over the course of the four prior presidential races is 3.29%. Leip, *supra* (click to 2000, 2004, 2008, 2012, and 2016 presidential election results and hover over Ohio for each). Since 1992, moreover, Democratic candidates have won the state four times, while Republican candidates have won the state three times. *Id.* Other statewide races likewise show how moderate Ohio is politically, with Republican John Kasich winning the governorship by only 2% in 2010, COOK, *supra*, at 281,[8] and the state's two U.S. Senate seats split between a Democrat and Republican. States in the Senate, Ohio, *at* http://www.senate.gov/states/OH/intro.htm (last visited Sept. 5, 2017).

Despite all of this clear evidence of balanced partisan competitiveness in statewide elections, the Republican Party has dominated the Ohio General

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[8] Governor Kasich has been a popular governor and was re-elected in 2014 by a margin of 63.6% to 33%. COOK, *supra*, at 281.

Assembly for decades. The State Senate has been controlled by Republicans in an unbroken streak since 1985, with increasing margins that are currently peaking at 24 Republicans to 9 Democrats. *Ohio State Senate*, Ballotpedia, https://ballotpedia.org/Ohio_State_Senate (last visited Sept. 4, 2017). In the State House, since 1995 the Democratic Party has only had a majority in one session — 2009-10 — and the current partisan divide is an overwhelming majority of 66 Republicans to 33 Democrats. *Ohio House of Representatives*, Ballotpedia, https://ballotpedia.org/Ohio_House_of_Representatives (last visited Sept. 4, 2017).

The Jackman Report shows Ohio's state house among the top ten states in pro-Republican EG in both the 2012 and 2014 elections. SA253. Similarly, the AP's study of the 2016 state house elections ranked Ohio's EG among the top ten nationally in absolute value, and the eighth highest among those that favor Republicans, resulting in an excess of over 5 house seats for Republicans. AP Report, *supra*. The evidence strongly suggests that intentional political gerrymandering has played a significant role in supporting the continuing Republican majority in the Ohio General Assembly. This majority, which as in many similar states disproportionately represents exurban and rural areas in the state,[9] has aggressively

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[9] *See* David Stebenne, *Re-Mapping American Politics*, *in* 5 Origins: Current Events in Historical Perspective (February 2012), *available at* http://origins.osu.edu/article/re-mapping-american-politics-redistricting-revolution-fifty-years-later (discussing the geography of gerrymandering in Ohio after the 2010 census); *see also id.* ("What the Republicans tried to do is to create the

contravened the policy preferences of the state's voters living in — and more accurately represented by — the state's larger cities.

With respect to local government in particular, the state legislature has in recent years targeted important subject matters for sweeping preemption. In 2002, the General Assembly preempted home rule authority for cities to respond to serious local problems involving predatory lending. 2002 Ohio Laws H 386 (codified as amended at OHIO REV. CODE ANN. §§ 1.63, 1349.25 to 1349.37 (West 2017)). In 2006, the General Assembly preempted local authority over residency for city employees, 2006 Ohio Laws S 82 (codified at OHIO REV. CODE ANN. §9.481 (West 2017)), *sustained by Lima v. State*, 909 N.E.2d 616 (Ohio 2009) (rejecting municipal home rule challenge to state preemption of local residency ordinances), and removed longstanding home rule authority to regulate gun safety. 2006 Ohio Laws H 347 (codified at OHIO REV. CODE ANN. §9.68 (West 2017)). And the General Assembly has likewise sought to preempt the ability of cities to enact local-hire laws, *see* 2015 Ohio Laws H 180 (codified at Ohio Rev. Code Ann. §9.75 (West 2017)); *see also City of Cleveland v. State*, No. CV-16-868008 (Ct. C.P. Cuyahoga Cnty., Ohio Jan. 31, 2017) (finding that the state's preemption of local-hire laws unconstitutionally infringed on Cleveland's home-rule authority), *appeal docketed*,

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maximum number of safe Republican seats in the . . . Ohio General Assembly, and a minimum number of truly competitive seats [by] break[ing] up major metropolitan areas (where the Democrats are usually strongest) and combin[ing] pieces of them with exurban, small town and rural areas (where the Republicans are strongest).").

No. CA-17-105500 (Ohio Ct. App. 2017). The General Assembly has also limited the ability of cities to use red-light and speed cameras. *See* 2013 Ohio Laws S 342 (codified at OHIO REV. CODE ANN. § 4511 et. seq. (West 2017)); *see also City of Dayton v. State*, 2017 WL 3215532 (Ohio July 26, 2017) (holding that the provisions of the state law that sought to regulate local government use and enforcement of red-light and speed cameras violated the Home Rule provision of the Ohio Constitution).

In sum, residents of a quintessentially "purple" state like Ohio who prefer their local governments to enact policies that match their small-d democratic preferences find themselves repeatedly blocked by an entrenched political alignment in the state legislature that may well have been attributable to intentional political gerrymandering.

E. Wisconsin

Wisconsin's record of gerrymandering after 2010 was articulated in detail by the district court. *Whitford*, 218 F. Supp. 3d at 902-10. The 2016 AP report demonstrates that the Wisconsin House's EG has remained high, at 9.76%, the third highest in the nation and resulting in 9 to 10 excess Republican seats in the Wisconsin House. AP Report, *supra*. Although Wisconsin has a long-established system of home rule designed to empower cities to pass ordinances that promote their citizens' policy preferences, *see Black v. City of Milwaukee*, 882 N.W.2d 333, 337 (Wis. 2016) (noting that Wisconsin's home rule dates from 1924), the state legislature since 2012 has attempted to erode local policymaking authority through aggressive

preemption. A list of subject matters preempted by the state legislature since 2012 include:

- nutrition and food policy, *see* 2013 Wis. Legis. Serv. 20 § 1269m (West) (codified at WIS. STAT. ANN. § 66.0418 (West 2017));

- issuance of photo identification cards by local governments, particularly to prohibit their use in voting, *see* 2015 Wis. Legis. Serv. 374 § 2 (West) (codified at WIS. STAT. ANN. § 66.0438 (West 2017)); and

- municipal employee residency requirements, *see* 2013 Wis. Legis. Serv. 20 § 1270 (West) (codified at WIS. STAT. ANN. § 66.0502 (West 2017)), *sustained by Black*, 882 N.W.2d at 337.

To be sure, other key preemptive laws in Wisconsin were passed before the apparent gerrymandering took effect, such as a state law in 2005 preempting local minimum wages, WIS. STAT. ANN. § 104.001 (West 2017), and a 2011 law preempting local paid sick leave ordinances. *Id.* § 103.10(1m). The inability to reverse these laws, however, may also be partly attributable to gerrymandering. *Cf. Whitford*, 218 F. Supp. 3d at 901 n.266 (gerrymandering deprives Democrats of "the opportunity to pass an agenda consistent with their policy objectives").

F. Other States

Many other states have in recent years engaged in aggressive preemption of local authority. *See* NLC, *City Rights in an Era of Preemption: A State-by-State Analysis* (2017), http://nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf (last visited Sept. 5, 2017). This brief does not assert that intentional partisan gerrymandering is the sole or even leading cause of this phenomenon, only that it is likely a significant factor. It is worth noting that while all of the states featured above reveal evidence of pro-Republican gerrymandering, the Jackman Report demonstrated indicia of pro-Democratic gerrymandering in a handful of states, including, most notably, Rhode Island. SA253.[10] Interestingly, the Rhode Island legislature, like many of its apparently gerrymandered Republican counterparts, preempted the authority of local governments in the state to raise the minimum wage in 2014. 2014 R.I. Pub. Laws ch. 145, art. 11, § 4 (codified at R.I. GEN. LAWS § 28-12-25 (2017)). This preemption had the effect of stifling efforts in the state's largest city, Providence, to raise its minimum wage above the statewide level for a subset of workers. Sam Adler-Bell, *Why Are Rhode Island Democrats Blocking Minimum-Wage Increases?*, THE NATION, June 11, 2014, https://www.thenation.com/article/why-are-rhode-island-democrats-blocking-minimum-wage-increases/ (noting that Providence was on the verge of

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[10] By contrast, the 2016 AP report reveals only a modest pro-Democratic EG of 2.3% in the 2016 Rhode Island state house elections, resulting in 1 or 2 extra Democratic seats. AP Report, *supra*.

passing a $15/hour minimum wage law for employees of large hotels).

CONCLUSION

The legislative record from states with major indicia of intentional partisan gerrymandering suggests that such gerrymandering plays a significant role in squelching local democracy. Amici, therefore, urge this Court, for the foregoing reasons, to uphold the district court's ruling.

Respectfully submitted,

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